UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	Case No. 4:05-cv-00329-TCK-SAJ
	)	
v.	)	
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	January 16, 2007

STATE OF OKLAHOMA'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS IN LIGHT OF *NEW MEXICO v. GENERAL ELECTRIC*

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Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("Oklahoma"), hereby submits this response in opposition to Defendants' Motion for Judgment on the Pleadings in Light of *New Mexico v. General Electric* dated December 12, 2006 (Dkt. #1004) ("Defendants' Motion"). Defendants argue that the Tenth Circuit Court of Appeals' recent decision in *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), requires, on CERCLA preemption grounds, the partial or complete dismissal of certain of Oklahoma's claims. In this procedural posture, however, the *New Mexico* decision has no current application because, among other reasons, Defendants concurrently dispute the applicability of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and the maintainability of Oklahoma's CERCLA claims. Moreover, even if the Court substantively applies *New Mexico* to the First Amended Complaint ("FAC"),

there are no grounds to support the dismissal of its claims on preemption or displacement grounds.[1] As the holding of *New Mexico* was limited to the preemption of the use of remedies, the case provides no basis for the dismissal of claims. Accordingly, Defendants' Motion should be denied in its entirety.

In short, the only question that this Court must answer to resolve Defendants' Motion is whether there is any set of circumstances under which Oklahoma can prevail on the challenged claims and requests for relief if allowed to proceed. Because the answer to that question is plainly yes, Defendants' Motion must be denied.

I. LEGAL STANDARD

While Defendants' recitation on page 4 of the standard of review is generally correct, some additional principles warrant mention. First, motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) seeking the dismissal of claims are viewed with disfavor. "Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice." *Van Deelen v. City of Eudora*, 53 F. Supp. 2d 1223, 1227 (D. Kan. 1999) (citing *Cayman Exploration Corp. v. United Gas Pipe Line*, 873 F.2d 1357, 1359 (10th Cir. 1989)). Motions for judgment on the pleadings are treated as motions to dismiss under Fed. R. Civ. P. 12(b)(6), *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528 (10th Cir. 1992), which are viewed with disfavor and are therefore rarely granted. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990).

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[1] Nothing herein should be construed as a concession by Oklahoma that *New Mexico* was correctly decided. In fact, Oklahoma submits that *New Mexico* incorrectly applied conflict preemption principles and the scope of the CERCLA savings clauses in reaching its holding. However, inasmuch as Oklahoma submits that even assuming arguendo *New Mexico* were correctly decided and consideration of preemption were appropriate at this stage in the proceedings, CERCLA would neither preempt nor displace any of Oklahoma's claims or requests for damages.

Second, the standard by which the Tenth Circuit will uphold a grant of judgment on the pleadings is a strict one. Specifically, the Tenth Circuit will uphold such a grant "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 (10th Cir. 2005) (internal quotation marks omitted) (reversing district court's grant of judgment on the pleadings based on undeveloped record).

Third, "[t]he determination of a Rule 12(c) motion is confined to the pleadings and to any documents attached as exhibits to the pleadings, *including the defendant's answer*." *Micale v. Bank One N.A. (Chicago)*, 382 F. Supp. 2d 1207, 1216 (D. Colo. 2005) (emphasis added); *Quartararo v. Catterson*, 917 F. Supp. 919, 930 (E.D.N.Y. 1996).

Fourth, Defendants have cited *no* authority in their Brief – and Oklahoma is not aware of any – standing for the proposition that CERCLA requires on preemption grounds the partial or complete dismissal of a non-CERCLA claim in the pleading stage.

In sum, these principles instruct that a motion for judgment on the pleadings must be denied where there is any set of facts – including one created by the defendant's answer – that would permit a plaintiff to prevail on any of the challenged claims or requested remedies.

II. SUMMARY OF *NEW MEXICO* LITIGATION

A brief review of *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), is appropriate in view of Defendants' almost exclusive reliance on the case, which Defendants erroneously claim is "a very similar case." (Defs' Brief at 3.)

For sixteen years prior to the commencement of the New Mexico Attorney General's lawsuit in *New Mexico*, the EPA and various state agencies had been engaged in a CERCLA remediation program to clean up the groundwater contamination in Albuquerque's South Valley,

a site placed on the "National Priorities List" by the EPA.[2] *Id.* at 1227. Notably, the remediation program included the participation of those entities that eventually became defendants in the Attorney General's lawsuit. *Id.* at 1225, 1235. Years after the program began, the Attorney General brought the lawsuit, joining New Mexico's natural resource trustee as an involuntary party plaintiff, and seeking under state law public nuisance and negligence theories over a billion dollars for injuries outside the scope of the EPA remediation, i.e., for an alleged, but unproven, deficiency in the EPA's chosen remedy. *New Mexico v. General Electric Co.*, 322 F. Supp. 2d 1237, 1239 (D.N.M. 2004). During the litigation, New Mexico expressly acknowledged that any damage recovery would ***not*** be used to restore or repair damaged natural resources. *Id.* at 1259. Following extensive discovery, the district court granted summary judgment against New Mexico for its failure to raise genuine issues of fact as to injury and damages. *Id.* at 1257.

On appeal, the Tenth Circuit analyzed the scope of New Mexico's state law NRD claim and CERCLA's preemptive effect on its requested remedies. The Court held: "CERCLA's comprehensive NRD scheme preempts any state *remedy* designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource. . . . The restrictions on the *use* of NRDs in § 9607(f)(1) represent Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste. . . . *This is not to say the State's public nuisance and negligence theories of recovery are completely preempted* in view of the ongoing remediation in the South Valley. We need not go that far." *New Mexico*, 467 F.3d at 1247 (emphasis added). Stated plainly, under *New Mexico*, CERCLA preempts certain uses of remedies, not claims; it is the non-NRD *use* of an NRD recovery (i.e., the *remedy*), and not the claim, that is preempted. In fact, under *New*

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[2] The NPL is the list of hazardous waste sites eligible for long-term remedial action financed under the federal Superfund program. *See* 42 U.S.C. § 9605; 40 C.F.R. § 300.425.

Mexico, common law claims for the recovery of natural resource damages are not preempted. *Id.* at 1250.

III. THE APPLICATION OF *NEW MEXICO* AND THE SCOPE OF CERCLA PREEMPTION, IF ANY, CANNOT BE DETERMINED IN THIS PROCEDURAL POSTURE.

As an initial matter, the relief Defendants seek cannot be granted in this procedural posture. Defendants move to dismiss Oklahoma's demand for damages under Counts Four and Six (state law nuisance and trespass) of the FAC, its claims in Count Five (federal common law nuisance) and Count Ten (unjust enrichment, restitution or disgorgement), and its request for punitive and exemplary damages. Defendants rely nearly exclusively upon the Tenth Circuit's recent decision in *New Mexico*, claiming that it mandates that such claims and/or demands for damages are preempted or displaced by CERCLA. The legal principles of *New Mexico* have no current application to this case, however, because, unlike *New Mexico*, the applicability of CERCLA to the present case has yet to be stipulated or adjudicated. At a minimum, until the threshold question of CERCLA's applicability is answered, the scope of CERCLA preemption, if any, may not be determined. Accordingly, Defendants' Motion should be denied in its entirety.

As a starting point, Defendants' Motion – and the import of this procedural setting – must be considered in light of CERCLA's savings provisions in 42 U.S.C. §§ 9652(d) and 9614(a), as well as Federal Rule of Civil Procedure 8. CERCLA's savings provisions provide as follows:

> § 9652. Effective dates; savings provisions
>
> > (d) ***Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.*** The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

§ 9614. Relationship to other law

> (a) Additional State liability or requirements with respect to release of substances within State
>
> ***Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.***

42 U.S.C. §§ 9652(d), 9614(a) (emphasis added). Moreover, Rule 8(e)(2) of the Federal Rules of Civil Procedure provides in part:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. . . .

Fed. R. Civ. P. 8(e)(2). Finally, Rule 8(f) provides: "All pleadings shall be so construed as to do substantial justice."

Based on CERCLA's savings clauses, the language of Rule 8 and its underlying principles, or both, several courts have denied motions to dismiss on CERCLA preemption grounds, concluding that CERCLA preemption may not be determined in the context of a motion to dismiss (and necessarily a motion for judgment on the pleadings, which is reviewed under the identical standard). *See, e.g.*, *Truck Components, Inc. v. K-H Corp.*, No. 94 C 50250, 1995 WL 692541, *11 (N.D. Ill. Nov. 22, 1995) (denying motion to dismiss restitution claim based on CERCLA preemption, stating that: "While it would seem at this stage of the proceedings that the extent of the relief sought in [the restitution claim] will be essentially the same as that sought in other counts, plaintiffs remain free to plead alternative theories so long as they are otherwise available under the law. *See* Fed. R. Civ. P. 8(a)."); *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 111-18 (E.D.N.Y. 2005) (denying motion to dismiss common law claims based on CERCLA preemption during pleadings stage); *Solvent Chem. Co. v. E.I. Dupont de Nemours & Co.*, 242 F. Supp. 2d 196, 211 (W.D.N.Y. 2002) (denying motion to dismiss common law

contribution claim); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1041 (E.D. Cal. 2002) (denying motion for summary judgment concluding, based on § 9652(d) savings clause, that CERCLA does not preempt state law claim for declaratory relief). *See also Caldwell Trucking PRP Group v. Caldwell Trucking Co.*, 154 F. Supp. 2d 870, 876 (D.N.J. 2001); *United States v. Montrose Chem. Corp. of California*, 788 F. Supp. 1485, 1496 (C.D. Cal. 1992) (denying motion to dismiss state law counterclaims on CERCLA grounds).

Here, based on Defendants' Answers and Affirmative Defenses, it is at least conceivable, even if highly unlikely, for example, that (1) CERCLA does not apply to the IRW problem, (2) CERCLA applies only to a portion of the IRW problem, or (3) Oklahoma may not be able to prove its CERCLA claims, while able to prove one or more of the claims challenged by Defendants' Motion. Any of these possibilities provides a basis for the denial of Defendants' Motion under the standard applicable to a motion for judgment on the pleadings.

Finally, Defendants have not cited any authority – and Oklahoma is not aware of any – standing for the proposition that, in the context of a motion to dismiss or motion for judgment on the pleadings, a plaintiff's non-CERCLA claims or demands for damages may be dismissed on CERCLA preemption grounds.

In sum, dismissing an environmental plaintiff's non-CERCLA claims or requests for relief based on CERCLA preemption grounds at a premature or otherwise procedurally improper phase runs afoul of Congress's expressed intent that "CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *New Mexico*, 467 F.3d at 1244. Moreover, contrary to CERCLA's purpose of "solv[ing] this country's hazardous waste cleanup problem," *id.*, and contrary to Defendants' assertion that Oklahoma could obtain a double recovery, such a dismissal leaves open the

possibility of Defendants' escaping liability altogether. Based on this procedural infirmity, Defendants' Motion should be denied.

IV. DEFENDANTS' MOTION SHOULD BE DENIED IN ITS ENTIRETY IN VIEW OF DEFENDANTS' CONCURRENT POSITION MAINTAINED IN THEIR ANSWERS/AFFIRMATIVE DEFENSES THAT CERCLA DOES NOT APPLY.

While Defendants seek, on CERCLA preemption and displacement grounds, the dismissal of certain of Oklahoma's claims and requests for damages, they take the concurrent, yet inconsistent, position in their Answers and Affirmative Defenses to the FAC that either CERCLA does not apply or Oklahoma's CERCLA claims are barred on some other basis. Not only do Defendants dispute CERCLA's applicability as a legal matter, but their own Answers and Affirmative Defenses create questions of fact that provide an independent basis for denying their Motion.

By way of background, Oklahoma's First Amended Complaint asserts two CERCLA-based claims, namely, Count One (¶¶ 70-77: CERCLA Cost Recovery – 42 U.S.C. § 9607) and Count Two (¶¶ 78-89: CERCLA Natural Resource Damages – 42 U.S.C. § 9607). Defendants have uniformly denied the allegations of these counts and pled various affirmative defenses challenging CERCLA's applicability to this case, including but not limited to the following:

- Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. (Dkt. #73): *See, e.g.*, Affirmative Defense Nos. 1 (failure to state a claim); 24 (CERCLA exemptions and exclusions apply); 41 ("poultry litter does not fall within the statutory or regulatory definition of a 'hazardous substance' or 'hazardous waste'"); 42 (failure to identify a "facility" under CERCLA);

- Defendant Peterson Farms, Inc. (Dkt. #78): *See, e.g.*, ¶ 71 ("neither poultry litter nor the constituents therein are hazardous substances, nor are they within the jurisdiction of CERCLA"); ¶ 72 ("In addition to denying that poultry litter and the constituents therein are within the jurisdiction of CERCLA, Peterson denies that every parcel of public and privately owned land within the IRW can legally or technically be characterized as a 'Superfund Site' within the meaning of CERCLA"); ¶ 76 (denying release or threatened release of any "hazardous

substance" under CERCLA); ¶ 81; Affirmative Defense Nos. 8 ("poultry litter does not fall within the statutory or regulatory definition of a 'hazardous substance'" under CERCLA); ¶ 17 (failure to identify "facility" under CERCLA);

- Defendant Simmons Food, Inc. (Dkt. #60): *See, e.g.*, Affirmative Defense ¶ 149 (failure to state claim under CERCLA "in that it does not allege the release or threat of release of any hazardous substance"); ¶¶ 150-51 (failure to state claim under CERCLA because of fertilizer exemption or permitted releases); ¶ 152 (not within four classes of persons who may have CERCLA liability); ¶¶ 153-56, 160-61;

- Defendants George's, Inc. and George's Farms, Inc. (Dkt. #63): *See, e.g.*, Affirmative Defense ¶ 148 (failure to state a claim); ¶ 149 (failure to allege release or threat of release of any hazardous substance under CERCLA); ¶¶ 150-51 (failure to allege release or threat of release of any substance not subject to CERCLA's fertilizer exemption or permitted releases); ¶ 152 (defendant not covered under CERCLA); ¶¶ 153-56, 160-61, 196;

- Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. (Dkt. #79): *See, e.g.*, Affirmative Defense Nos. 1 (failure to state a claim); 9 and 28 (preemption); 11 (Plaintiff as potentially responsible party); 32 (CERCLA exemptions and exclusions apply); and

- Defendant Willow Brook Foods, Inc. (Dkt. #61): *See, e.g.*, Affirmative Defense Nos. 1 and 5 (failure to state a claim); 6 and 8 (preemption); 9 (not a liable party under CERCLA); 12 (failure to identify a "facility" at which releases of "hazardous substances" have occurred); 19 (CERCLA exemptions and exclusions apply).

These Affirmative Defenses reveal that Defendants dispute CERCLA's applicability as a legal matter. For example, Defendants assert that they are not liable parties under CERCLA and that various CERCLA exemptions and exclusions apply.[3]

Defendants' Answers and Affirmative Defenses further reveal that several questions of fact exist, which go toward the threshold question of CERCLA's applicability. By way of example only, in conjunction with its CERCLA claims, Oklahoma alleges that "[t]he IRW . . .

[3] Another example of Defendants' inconsistency concerning CERCLA's applicability is Defendants' assertion in their Answers and Affirmative Defenses that the FAC does not allege the release of a "hazardous substance" under CERCLA. In *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1283 (N.D. Okla. 2003) (vacated due to settlement), Defendants vigorously took the position that poultry litter generally, and phosphorous contained in poultry litter in the form of phosphate specifically, is not a hazardous substance under CERCLA.

constitutes a 'site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located' . . . and, as such, constitutes a 'facility' within the meaning of CERCLA, 42 U.S.C. § 9601(9)." FAC ¶ 72 (Count One); ¶ 81 (Count Two). Each of the moving Defendants has denied these allegations in its Answer and/or has, in addition, asserted (either directly or through incorporation by reference) an affirmative defense alleging that the IRW is not a "facility" (and that, therefore, Oklahoma cannot prove its CERCLA claims). Specifically, Defendants have pled as follows:

- Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. (Dkt. #73): *See* Answer ¶¶ 72, 81; Forty-Second Affirmative Defense ("Counts 1 and 2 of the Complaint should be dismissed due to Plaintiffs' failure to identify and describe any specific lands it asserts is a 'facility' within the meaning of CERCLA.");

- Defendant Peterson Farms, Inc. (Dkt. #78): *See* Answer ¶¶ 72, 81; Affirmative Defense No. 17 ("Counts 1 and 2 of the Complaint should be dismissed due to Plaintiffs' failure to identify and describe any specific lands it asserts is a 'facility' within the meaning of CERCLA.");

- Defendant Simmons Food, Inc. (Dkt. #60): *See* Answer ¶¶ 72, 81; Affirmative Defense ¶193 (1 of 2) ("Simmons Foods, Inc. adopts and incorporates by reference all affirmative defenses presently or subsequently asserted by any of its co-defendants.");

- Defendants George's, Inc. and George's Farms, Inc. (Dkt. #63): *See* Answer ¶¶ 72, 81; Affirmative Defense ¶ 193 ("George's adopts and incorporates by reference all affirmative defenses presently or subsequently asserted by any of its co-defendants.");

- Defendants Cal-Maine Foods and Cal-Maine Farms (Dkt. #79): *See* Answer ¶¶ 72, 81; and

- Defendant Willow Brook Foods, Inc. (Dkt. #61): *See* Answer ¶¶ 72, 81; Affirmative Defense No. 12 ("Plaintiffs have failed to identify a 'facility' at which releases of 'hazardous substances' have occurred . . . .").

Whether a site constitutes a "facility" under CERCLA, 42 U.S.C. § 9601(9), is a question of fact. *See, e.g., Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152, 1159 (S.D. Cal. 2006); *Miami-Dade County, FL v. U.S.*, No. 01-1930-CIV, 2003 WL 22992283, *3 n.7 (S.D. Fla. Dec. 4,

2003). Because CERCLA's applicability depends (in part) on this disputed factual question, it would be improper to deprive Oklahoma of any non-CERCLA claim or remedy on CERCLA preemption grounds.

Moreover, as stated previously, Congress's purpose in enacting CERCLA was to expand the rights and remedies available to an environmental plaintiff, not to deprive that plaintiff of any such rights. *See* 42 U.S.C. §§ 9652(d) and 9614(a); *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993). It would simply be contrary to CERCLA's purpose, as well as common sense, to dismiss the claims challenged in Defendants' Motion, in whole or in part, while the viability of Oklahoma's CERCLA claims remains disputed by Defendants, potentially depriving Oklahoma of a sufficient range of remedies, i.e., a situation that CERCLA's savings clauses were designed to prevent. *New Mexico*, 467 F.3d at 1247 ("The legislature doesn't want to wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted." [internal quotation marks omitted]); *see also id.* at 1250. In view of Defendants' concurrent position taken in their Answers and Affirmative Defenses as described above, namely, that CERCLA does not apply to the IRW as a legal or factual matter, Defendants' Motion should be denied in its entirety.

V. DEFENDANTS' MOTION SHOULD BE DENIED ON THE MERITS BECAUSE CERCLA NEITHER PREEMPTS NOR DISPLACES ANY OF OKLAHOMA'S FEDERAL OR STATE LAW CLAIMS OR REQUESTS FOR DAMAGES.

In the event the Court reaches the merits of Defendants' Motion, the Motion should nonetheless be denied. Defendants assert that, pursuant to *New Mexico*, CERCLA not only (1) preempts Oklahoma's demand for damages under Counts Four and Six (state law nuisance and trespass), its claim in Count Ten (unjust enrichment, restitution or disgorgement), and its request for punitive and exemplary damages, but also (2) displaces Oklahoma's federal common

law nuisance claim (Count Five). Because the analyses governing a federal statute's preemption of state law and displacement of federal common law differ, Oklahoma addresses Defendants' arguments separately.

A. CERCLA Does Not Preempt Oklahoma's Demand for Damages Under Counts Four and Six on Implied Conflict Preemption Grounds.

Defendants' argument that CERCLA preempts Oklahoma's compensatory damages demands under Counts Four and Six fails as a substantive matter. Defendants base their assertion solely on conflict preemption grounds (as opposed to express preemption or occupation of the field preemption), contending that the challenged demands for damages in two ways conflict with, and therefore are preempted by, CERCLA. (Defs' Brief at 8.) First, Defendants argue that "unrestricted" damage awards "could *potentially* frustrate the restoration or replacement of damaged natural resources by allowing the plaintiff[] to siphon the money toward other uses." (Defs' Brief at 8 [emphasis added].) Second, Defendants claim that "unrestricted" damage awards *might* "open the door for an impermissible double recovery." (*Id.*) Defendants are wrong on both fronts. There is no current conflict, and Defendants do not identify one. As explained below, in the absence of an actual conflict, conflict preemption does not apply.

1. Conflict Preemption Principles

By way of review, conflict preemption occurs where state law "*actually conflicts* with federal law. Thus, the [U.S. Supreme] Court has found pre-emption where [a] it is impossible for a private party to comply with both state and federal requirements, or [b] where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000) (emphasis added) (reversing district court's grant of summary judgment to defendants on express

and implied preemption grounds), quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Here, Defendants rely solely on the latter prong.

In order for conflict preemption to apply, there must be an *actual* – and not merely a hypothetical – conflict. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."); *English*, 496 U.S. at 79 ("state law is pre-empted to the extent that it *actually* conflicts with federal law") [emphasis added]. Furthermore, where a defendant asserts a claim of implied conflict preemption to preclude a state law claim in "fields of traditional state regulation," the United States Supreme Court has made it clear that a finding of preemption is to be less readily found. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Indeed, "[e]nvironmental regulation is an area of traditional state control." *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665 (9th Cir. 2003). Defendants' assertion of implied conflict preemption – based on the notion that Oklahoma's challenged state law claims "stand[] as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA" (Defs' Brief at 6) – simply does not satisfy these important principles of federalism and conflict preemption.

2. Oklahoma's pursuit of damages relating to its state law claims in Counts Four and Six does not create an actual conflict with CERCLA.

Defendants first contend that *New Mexico*, 467 F.3d 1223, instructs that under the circumstances of this case, Oklahoma's damages demands under state law (in Counts Four and Six) are preempted because any such recovery could potentially frustrate CERCLA's purpose in restoring or replacing damaged natural resources. (Defendants do not challenge Oklahoma's demand for injunctive relief under these Counts.) Defendants' contention ignores the fundamental differences between this case and the situation in *New Mexico*, ignores the actual provisions of 62 Okla. Stat. § 7.1, and is premature.

First, unlike the piecemeal approach in the *New Mexico* litigation, Oklahoma, through its Attorney General and Secretary of the Environment (the State's natural resource trustee under CERCLA) working together, has chosen to take a holistic approach to remedy its injuries in the IRW. Therefore, the tension created by New Mexico's piecemeal approach, which gave rise to the Tenth Circuit's concern – that an NRD recovery would be diverted and would potentially be insufficient to restore or replace the natural resource – simply is not at work here.

Second, nothing in 62 Okla. Stat. § 7.1 requires Oklahoma to use proceeds of a judgment in a way inconsistent with the requirements of CERCLA NRD. Therefore, there is no actual present conflict. Indeed, assuming for purposes of argument that *New Mexico* applies to the instant case, it would only be unless and until Oklahoma *actually* were to use an NRD recovery under Counts Four and Six for purposes inconsistent with the applicable dictates of CERCLA NRD law, that conflict preemption would be an issue. Such an eventuality has not occurred and may never occur. Defendants' contentions are therefore unfounded and premature. *Rice*, 458 U.S. at 659 ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

3. CERCLA contemplates recovery under state law, and both CERCLA and state law forbid any double recovery. Thus, there is no actual conflict on this basis.

Defendants also contend that Oklahoma's demands for damages under Counts Four and Six conflict with CERCLA's proscription against double recovery. This argument also fails.

By its express terms, CERCLA simultaneously allows recovery under state law claims, including common law claims, and forbids any double recovery that might result. When read together, these provisions make clear that any hypothetical double recovery, which is prohibited anyway by 42 U.S.C. §§ 9614(b) and 9607(f)(1), does not render ineffective a plaintiff's state law damages demands, which are expressly preserved in 42 U.S.C. §§ 9652(d) and 9614(a).

CERCLA's savings provisions in 42 U.S.C. §§ 9652(d) and 9614(a), which are quoted above in Section III, need not be repeated here. In § 9652(d), Congress unambiguously expressed its intention not to affect or modify the obligations of any party under either state or federal law, including common law, while also negating any policy conclusion that strict liability would not apply to activities relating to the release of hazardous substances, pollutants or contaminants. By explicit legislative declaration, CERCLA does not modify the *obligations* or the *liabilities* under federal or state law, including federal or state common law relating to hazardous substances, pollutants, or contaminants or other such activities. Similarly, § 9614(a) unambiguously states Congress's intention not to preempt a State from imposing any additional *liability* or *requirement* with respect to the release of hazardous substances.

Taken together, these two provisions clearly establish that Congress intended to leave intact other federal and state law, including any applicable common law, with respect to releases of hazardous substances or other pollutants, and unambiguously disclaim any Congressional intent to preempt Oklahoma from imposing liability in excess of that imposed by CERCLA. Indeed, in *New Mexico*, the Tenth Circuit explicitly recognized that CERCLA's saving clauses (as well as other provisions) undoubtedly preserve a quantum of state legislative and common law actions and remedies related to the problem of hazardous waste. *New Mexico*, 467 F.3d at 1246, 1246 n.33 ("Congress recognized the role of state law in hazardous waste cleanup when it directly addressed the potential overlap of CERCLA and state law in 42 U.S.C. § 9614(b)."); *see also id.* at 1250.

Coming on the heels of § 9614(a), in which Congress disclaims an intention to preempt any state from imposing any additional liability or requirements with respect to the release of hazardous substances, 42 U.S.C. § 9614(b) prohibits double recovery. Section 9614(b) provides:

> (b) Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims
>
> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. *Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.*

42 U.S.C. § 9614(b) (emphasis added). Section 9607(f)(1) also provides in part: "There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource." 42 U.S.C. § 9607(f)(1). Simply stated, as pertains here, any amounts received as compensation pursuant to CERCLA for NRD may not also be recovered for the same NRD pursuant to any other federal or state law; conversely, any amounts received as compensation for NRD pursuant to any other federal or state law may not be recovered for the same NRD damages under CERCLA. Thus, double recoveries are prohibited under the explicit terms of CERCLA.

Significantly, provisions such as §§ 9607(f)(1) and 9614(b) would be unnecessary surplusage if, contrary to the provisions of 42 U.S.C. §§ 9614(a) and 9652(d), CERCLA preempted damage claims under other federal or state law. Without a clear congressional command otherwise, a statute cannot be construed in a manner that renders some of its provisions surplusage. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). These provisions create a unified Congressionally mandated whole, in which other sources of federal and state liability are left intact, and double recoveries are prohibited. Likewise, Oklahoma law prohibits double recoveries. *Carris v. John R. Thomas & Assoc.*, 896 P.2d 522, 530 (Okla. 1995); *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1223 (Okla. 1992).

Moreover, contrary to Defendants' suggestion, the Tenth Circuit in *New Mexico* did not

hold that dismissing a demand for damages under an alternative or complementary state law theory is an appropriate tool to avoid the potential for a double recovery. Instead, the Tenth Circuit has previously instructed that "[w]here a jury award duplicates damages, the court, either sua sponte or on motion of a party, should reduce the judgment by the amount of the duplication. . . . The question of whether damage awards are duplicative is one of fact . . . ." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1459 (10th Cir. 1997) (reversing district court's requiring plaintiff to elect single punitive damage award against defendant).

Not only are Defendants' concerns regarding any double recovery adequately protected under CERCLA, Oklahoma law, and this Court's authority to prevent a double recovery following a jury verdict, Defendants' fears are premature. *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 116 (E.D.N.Y. 2005) (rejecting as premature defendants' argument that "the potential for Plaintiff's double recovery warrants dismissal of its common law claims").

4. Because there is no actual/current conflict, conflict preemption does not apply.

Because the only two *potential* concerns identified by Defendants – i.e., the *potential* use of an NRD recovery for purposes inconsistent with the applicable CERCLA NRD law and the *potential* for a double recovery – do not present a current or actual conflict, conflict preemption does not apply so as to require the dismissal of Oklahoma's demands for damages under Counts Four and Six. *See Rice*, 458 U.S. at 659 ("[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption" of state law). Therefore, Defendants' Motion should be denied.

B. *New Mexico* Does Not Require Dismissal of Oklahoma's Federal Common Law Nuisance Claim on Displacement Grounds.

Defendants also claim that Oklahoma's federal common law nuisance claim should be dismissed because that cause of action has been displaced by CERCLA's NRD remedy. (Defs'

Brief at 9-11.) Defendants make the following assertions in support of this argument:

- "[A]ny federal common law action for injury to natural resources is displaced and must be dismissed in its entirety." (Defs' Brief at 10.)
- "By legislating in this area, Congress has filled any void that federal common law could have filled. Accordingly, any federal common law cause of action that could have existed before CERCLA's enactment has been displaced by CERCLA's statutory and regulatory terms." (Defs' Brief at 11.)

As discussed below, these assertions are unavailing against the principles that govern a federal statute's displacement of a federal common law claim. Because Defendants cannot satisfy such principles, their Motion seeking the dismissal of Oklahoma's federal common law nuisance claim in Count Five should be denied.

As an initial matter, "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). "[L]ongstanding is the principle that statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783 [(1952)]." *United States v. Texas,* 507 U.S. 529, 534 (1993) (internal quotation marks omitted). The Court went on to state: "In such cases, Congress does not write upon a clean state. . . . In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citations omitted). Although "Congress need not 'affirmatively proscribe' the common-law doctrine at issue . . . courts may take it as a given that Congress has legislated with an expectation that the common law principle will apply except when a statutory purpose to the contrary is evident." *Id.* Notably, the question in determining whether a federal statute displaces federal common law is whether Congress intended to occupy the field. *Milwaukee*, 451 U.S. at 324.

Here, to show CERCLA's purported displacement of Oklahoma's federal common law nuisance claim, Defendants must overcome the presumption favoring the retention of federal common law and demonstrate that Congress intended to preclude environmental plaintiffs from asserting a federal common law nuisance claim by enactment of CERCLA. Defendants' arguments are wholly unavailing.

First, Defendants' assertions, as quoted above, that CERCLA displaced otherwise available federal common law causes of action is directly contrary to the clear language of CERCLA's savings provision in 42 U.S.C. § 9652(d). As stated previously, CERCLA expressly provides that "***[n]othing in this chapter*** [i.e., CERCLA] shall affect or modify in any way the obligations or liabilities of any person ***under other Federal*** or State ***law, including common law***, with respect to releases of hazardous substances or other pollutants or contaminants. . . ." 42 U.S.C. § 9652(d) (emphasis added). By its express terms, CERCLA contemplates – not the *displacement* of, but – the *availability* of federal common law remedies to serve as a complement to CERCLA's provisions. Defendants' blanket statement that "any federal common law cause of action that could have existed before CERCLA's enactment has been displaced by CERCLA's statutory and regulatory terms" (Defs' Brief at 11) flies in the face of § 9652(d).

Second, as stated above, the question in determining whether a federal statute displaces federal common law is whether Congress intended to occupy the field. *Milwaukee*, 451 U.S. at 324. In this regard, it is well settled that Congress did not intend to occupy the field in enacting CERCLA. *See, e.g., New Mexico*, 467 F.3d at 1244; *United States v. City & County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (CERCLA preemption analysis implicates conflict preemption, not field preemption); *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (based on savings provisions, court held that

"CERCLA does not completely occupy the field of environmental regulation"); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991).

Third, Defendants do not attempt to explain how, and offer no support for the proposition that, CERCLA displaces the injunctive component of Oklahoma's federal common law nuisance claim. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049-52 (2d Cir. 1985) (upholding state public nuisance suit for injunctive relief where CERCLA failed to provide such relief), *cited in New Mexico*, 467 F.3d at 1246.

Finally, none of the three cases that Defendants cite in support of their displacement argument – *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), *Milwaukee*, 451 U.S. at 313-14, and *New Mexico*, 467 F.3d 1223 – involved the question of CERCLA's displacement of federal common law. First, *Texas Industries* and *Milwaukee* did not involve, let alone mention, CERCLA. Second, the plaintiff in *New Mexico* did not assert any federal common law causes of action and, therefore, the Tenth Circuit did not opine on CERCLA's displacement, if any, of federal common law. Simply put, none of the cases cited by Defendants has any bearing on the question of whether Congress intended through CERCLA to displace the availability of a federal common law nuisance claim.

In sum, Defendants have pointed to no authority to overcome the presumption that Congress did not intend to displace otherwise applicable federal common law when it enacted CERCLA. To the contrary, Congress expressed its intent in CERCLA's savings provision to preserve – and not to displace – "the obligations or liabilities of any person ***under other Federal*** or State ***law, including common law***, with respect to releases of hazardous substances or other pollutants or contaminants. . . ." 42 U.S.C. § 9652(d) (emphasis added). Such savings clause is far from an expression of legislative intent to supplant existing federal common law.

Accordingly, Defendants' Motion as to Count Five should be denied.

C. *New Mexico* Does Not Require Dismissal of Oklahoma's Claim for Unjust Enrichment, Restitution and Disgorgement in Count Ten.

Defendants next argue that, under the Tenth Circuit's *New Mexico* decision, Oklahoma's claim of unjust enrichment, restitution, and disgorgement in Count Ten of the FAC must be dismissed. (Defs' Brief at 11-15.) Specifically, Defendants contend that CERCLA preempts such a claim, and that CERCLA's natural resource damage provisions provide an available remedy at law. Defendant's argument is wholly unavailing.

1. CERCLA does not preempt Oklahoma's equitable claim of unjust enrichment, restitution and disgorgement.

Defendants' argument that CERCLA preempts Oklahoma's equitable claim is without merit. First, *New Mexico* does not require – and does not permit – the preemption of a *claim*. *See* Section II *supra*. Rather, under *New Mexico*, it is the non-NRD use of a *remedy* that may be preempted. Defendants do not identify how Oklahoma's equitable *remedy* creates an actual conflict.

Second, Defendants' reliance on *New Mexico* is further misplaced, as the plaintiff in *New Mexico* did not assert any equitable theories. Indeed, Defendants admit that "the specific theories of unjust enrichment, restitution, and disgorgement were not addressed in *New Mexico*." (Defs' Brief at 11.) Thus, *New Mexico* does not stand for the proposition that CERCLA preempts a plaintiff's equitable claim as a matter of law.

Third, Defendants' blanket statement that Oklahoma's unjust enrichment claim should be dismissed because it "raises the *potential* of a prohibited double recovery" (Defs' Brief at 12-13 [emphasis added]) fails under the same principles discussed above in Section V.A.3. Those principles, which need not be repeated here, instruct that CERCLA, Oklahoma law, and this

Court's authority to prevent a double recovery following a jury verdict adequately protects against any risk of a double recovery.

Fourth, under CERCLA's savings provisions, the precepts of Fed. R. Civ. P. 8 (discussed above in Section III), and *New Mexico*, Oklahoma remains free to pursue alternative and/or complementary theories of recovery, including any equitable remedies. *See, e.g., Truck Components, Inc. v. K-H Corp.*, No. 94 C 50250, 1995 WL 692541, *11 (N.D. Ill. Nov. 22, 1995) (denying motion to dismiss restitution claim based on CERCLA preemption, stating that at pleadings stage "plaintiffs remain free to plead alternative theories so long as they are otherwise available under the law").

Finally, not only does the Tenth Circuit's decision in *New Mexico*, 467 F.3d 1223, not stand for such a proposition, Defendants have not cited *any* case in which a court dismissed, in the context of a motion to dismiss or motion for judgment on the pleadings, an equitable claim based on CERCLA preemption grounds.

2. Oklahoma's equitable claim should not be dismissed on the basis that CERCLA's remedial scheme provides a remedy at law.

Defendants further claim that, even if CERCLA does not preempt Oklahoma's unjust enrichment claim, such claim should be dismissed because CERCLA's remedial scheme provides an adequate remedy at law. (Defs' Brief at 14-15.) As an initial matter, it is again curious that Defendants contend in their Motion that CERCLA provides an adequate remedy at law, while concurrently maintaining the position in their Answers and Affirmative Defenses that CERCLA does not even apply. In any event, this argument fails as a substantive matter, as it improperly applies general principles of equitable relief to this procedural posture.

In support of their argument, Defendants rely on four cases, none of which can be read as holding (or even suggesting) that dismissal of an equitable claim on preemption grounds is

appropriate. (Defs' Brief at 15.) *See Warren v. Century Bankcorp., Inc.*, 741 P.2d 846 (Okla. 1987) (plaintiff successfully brought derivative suit in equity); *Billingsley v. North*, 298 P.2d 418, 421-22 (Okla. 1956) (equity jurisdiction not available to plaintiff who fails to avail himself of *exclusive* statutory remedy); *Robertson v. Maney*, 166 P.2d 106, 107 (Okla. 1946) (affirming trial court's *factual finding* that plaintiffs were not entitled to an accounting); *Robinson v. Southerland*, 123 P.3d 35 (Okla. Civ. App. 2005) (incarcerated plaintiff, who asserted unjust enrichment claim against former counsel, had adequate legal remedy for breach of contract). Instead, these cases either weigh *against* dismissal of Oklahoma's unjust enrichment claim or are inapposite at best.

Based on the foregoing, Defendants' Motion as to Count Ten should be denied.

D. CERCLA Does Not Preempt Oklahoma's Request for Punitive and Exemplary Damages.

Finally, Defendants argue on pages 15 to 17 of their Brief that CERCLA preempts Oklahoma's request for punitive and exemplary damages. Defendants' final contention, which also flies in the face of Defendants' concurrent position that CERCLA does not apply, suffers the same fate as their earlier claims, for many of the same reasons.

First, Defendants' argument, solely based on conflict preemption, does not identify how permitting Oklahoma to pursue its request for punitive and exemplary damages under state law creates an *actual* conflict with Congress's purpose in CERCLA – a showing required under a conflict preemption analysis. *See* Section V.A, *supra.* There is no indication that an award of punitive damages would hinder any remedial action ultimately ordered. Until that time, any purported conflict is only hypothetical and does not warrant preemption. *Rice*, 458 U.S. at 659 ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

Second, there is no suggestion in CERCLA's savings clauses in 42 U.S.C. §§ 9614(a) and 9652(d), quoted above in Section III, that Congress intended to distinguish a plaintiff's ability *under state law* to recover punitive damages. Section 9614(a) is particularly poignant on this issue: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing *any additional liability or requirements* with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a) (emphasis added).

Third, Defendants' statement that "[u]nder CERCLA, punitive damages are authorized only in very limited circumstances which are not present in this case and which are specifically designed to accomplish the goal of compliance with the EPA's cleanup decisions" (Defs' Brief at 16) is a red herring, because Oklahoma does not seek punitive and exemplary damages pursuant to CERCLA, but rather under state law.

Fourth, CERCLA's savings clauses make it clear that compensatory damages may be awarded under state law theories, and even if such compensatory damages were restricted to be used for CERCLA's NRD purposes, those compensatory damages could form the predicate for an award of punitive damages under state law.

Finally, because Oklahoma's compensatory damages demands under Counts Four and Six are not preempted, *see* Section V.A, Defendants' claim that any such preemption requires the dismissal of Oklahoma's punitive damages claim is a non-starter. Therefore, Defendants' Motion as to Oklahoma's request for punitive damages should be denied.

VI. CONCLUSION

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings should be denied in its entirety.

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